IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67,423

TOM THOMAS,

Respondent.
_____/



# INITIAL BRIEF OF PETITIONER ON THE MERITS

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## PRELIMINARY STATEMENT

Respondent, Tom Thomas, the criminal defendant below and appellant in Thomas v. State, 450 So.2d 492 (Fla. 1st DCA 1984), Case No. AU-339, the movant for correction of sentence below and appellant in Thomas v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1429, on motion for rehearing denied, 10 F.L.W. 1809, Case No. BA-154, will be referred to as "respondent." Petitioner, the State of Florida, the prosecuting authority and appellee in the above cited decisions, will be referred to as "the State."

References to the one volume of the record in respondent's direct appeal containing the legal documents filed in that cause will be designated "(AR: )", while references to the five volumes of that record containing the transcript of testimony and proceedings at respondent's trial will be designated "(AT: )." References to the one volume of the record in respondent's

collateral appeal containing the legal documents filed in that cause will be designated "(CR: )", while references to the one volume of that record containing the transcript of proceedings held on respondent's motion to correct sentence will be designated "(CT: )." References to certain legal documents filed in these causes will be designated in appropriately descriptive terms.

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, a conformed copy of the decision under review is attached to this brief as an appendix.

All emphasis will be supplied by the State unless otherwise indicated.

## STATEMENT OF THE CASE AND FACTS

On April 15, 1981, the State filed an information in the Circuit Court of the Third Judicial Circuit in and for Suwannee County, Florida, charging respondent in pertinent part with the attempted first degree murder of Bertha Jones while in possession of a firearm (Count I), and the aggravated assault of Earl McFadden while in possession of a firearm (Count II), both offenses said to have occurred on March 23 (AR 1-3; CR 1-3). Trial was held on April 18-19, 1983 (AT 47-646), at which the State established that respondent:

> went to his victim's [Bertha Jones'] house trailer and commenced a conversation with her inside the trailer. He proceeded to pull a gun and shoot the victim several times. While he paused to reload the weapon, the victim managed to escaped into her yard. Thomas followed her there and shot her yet again. When her son [Earl McFadden] attempted to come to her aid, Thomas fired at him, inflicting no injury. He concluded this spree by firing one last bullet into the victim and then fled.

Thomas v. State, 10 F.L.W. 1429 (AT 79-86). Respondent was consequently convicted as charged (AR 65-66).

Respondent's motion for a new trial was denied, and he appeared for sentencing on June 20 (AR 647-663). The trial judge sentenced respondent to thirty years of imprisonment for the attempted first degree murder and five consecutive years of imprisonment for the aggravated assault, and without objection ordered that the three year mandatory minimum sentences he was required by §775.087(2), Fla.Stat. to impose as conditions of these sentences based upon respondent's possession of a

firearm should be served consecutively as well (AT 657; AR 71-78; CR 4-11). Respondent then pursued an appeal to the First District in early 1984, declining to challenge the propriety of the trial judge's order concerning the consecutive service of his mandatory minimum sentences notwithstanding this Court's decision in Palmer v. State, 438 So.2d 1 (Fla. 1983) (see "Initial Brief of Appellant" in Case No. AU-339).

The First District per curiam affirmed respondent's judgments and sentences without opinion on May 4, 1984, Thomas v. State, 450 So.2d 492 (Fla. 1st DCA 1984). Respondent shortly thereafter timely filed a Fla.R.Crim.P. 3.800 motion for correction of sentence with the trial judge, alleging for the first time in pertinent part that his mandatory minimum sentences should not have been ordered served consecutively under Palmer v. State because the offenses for which they were imposed occurred at the same time and place (CT 12-14). The trial judge denied respondent's motion without objection because, procedurally, this issue "should have been raised on appeal" and substantively, was without merit (CT 11-13; CR 15-16).

Respondent then pursued this issue by taking a second appeal to the First District (CT 19; 22). The State noted in its answer brief that respondent had neither "object[ed] to the consecutive mandatory minimum sentences imposed by the trial judge" nor "raise[d their alleged impropriety as an issue] in his direct appeal", and argued that respondent's claim was uncompelling on the merits (see "Answer Brief of Appellee" in Case No. BA-154, pp. 1-2). The First District, without commenting

upon the procedural propriety of such action, reached the merits of respondent's claim and reversed and remanded for resentencing pursuant to this Court's decision in Wilson v. State, 467 So.2d 996 (Fla. 1985). However, pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v), the Court certified the following question to this Court as being of great public importance:

> Whether the crimes for which the defendant was sentenced to *consecutive* three-year mandatory minimum terms pursuant to Section 775.087(2), Florida Statutes, were "offenses [which arose] from separate incidents occurring at separate times and places" within the meaning of the rule announced in Palmer v. State, 438 So.2d 1 (Fla. 1983)?

Thomas v. State, 10 F.L.W. 1429.[1]

The State timely moved for rehearing, arguing much more explicitly that respondent's failure to initially raise the putative sentencing error in the trial court and upon direct appeal precluded appellate review over the trial judge's denial of his subsequent collateral motion to correct sentence, and adding for the first time the argument that the First District did not have jurisdiction to review the denial of respondent's motion insofar as the sentences imposed were not "illegal" as in excess of the statutory maximums (see "Motion For Rehearing; or For Rehearing En Banc; or For Certification of Conflict" in Case No. BA-154). Finding that the former argument had not been timely presented and that the latter

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[1] Emphasis in original

interrelated argument was uncompelling on the merits, the First District denied rehearing. Thomas v. State, on motion for rehearing denied, 10 F.L.W. 1809. On July 26, the State filed with the First District a notice to invoke this Court's discretionary jurisdiction to review the aforementioned certified question of great public importance, and consequently also the two aforementioned interrelated issues it believes were properly presented below, see Tillman v. State, ___So.2d___ (Fla. 1985), 10 F.L.W. 305. On July 30, this Court ordered briefs on the merits.

## SUMMARY OF ARGUMENTS

The First District erred in holding that the trial judge could not order that respondent's three-year mandatory minimum prison sentences for the attempted first degree murder of Bertha Jones inside her abode and the aggravated assault of Earl McFadden outside this abode while in possession of a firearm should be served consecutively. Palmer v. State, 438 So.2d 1 (Fla. 1983) and its progeny permit the imposition of such sentencing conditions upon defendants who possess guns while proximately committing distinct crimes against distinct victims in proximate locales. Alternatively, the First District was without jurisdiction to reach the merits of respondent's Palmer claim collaterally because this claim could have been raised at trial and on direct appeal, but was not.

## ISSUES PRESENTED ON APPEAL

### ISSUE I

THE FIRST DISTRICT ERRED IN HOLDING THAT THE TRIAL JUDGE COULD NOT ORDER THAT RESPONDENT'S THREE YEAR MANDATORY MINIMUM PRISON SENTENCES FOR THE ATTEMPTED FIRST DEGREE MURDER OF BERTHA JONES AND THE AGGRAVATED ASSAULT OF EARL MCFADDEN WHILE IN POSSESSION OF A FIREARM SHOULD BE SERVED CONSECUTIVELY, BECAUSE THESE OFFENSES AROSE "FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" UNDER PALMER V. STATE, 438 SO.2d 1 (FLA. 1983).

### ISSUE II

THE FIRST DISTRICT SHOULD HAVE UPHELD THE TRIAL JUDGE'S DENIAL OF RESPONDENT'S COLLATERAL CLAIM THAT HE SHOULD NOT HAVE BEEN ORDERED TO SERVE HIS MANDATORY MINIMUM SENTENCES CONSECUTIVELY BECAUSE THE SENTENCES CHALLENGED WERE NOT IN EXCESS OF THE MAXIMUMS AUTHORIZED BY STATUTE AND THIS CLAIM SHOULD HAVE BEEN RAISED AT TRIAL AND UPON DIRECT APPEAL, REGARDLESS OF WHETHER THE STATE TIMELY ASSERTED THESE MATTERS AS BASES FOR DENYING RESPONDENT COLLATERAL RELIEF.

## ISSUE I

THE FIRST DISTRICT ERRED IN HOLDING THAT THE TRIAL JUDGE COULD NOT ORDER THAT RESPONDENT'S THREE YEAR MANDATORY MINIMUM PRISON SENTENCES FOR THE ATTEMPTED FIRST DEGREE MURDER OF BERTHA JONES AND THE AGGRAVATED ASSAULT OF EARL MCFADDEN WHILE IN POSSESSION OF A FIREARM SHOULD BE SERVED CONSECUTIVELY, BECAUSE THESE OFFENSES AROSE "FROM SEPARATE INCIDENTS OCCURRING AT SEPARATE TIMES AND PLACES" UNDER PALMER V. STATE, 438 So.2d 1 (FLA. 1983).

## ARGUMENT

In Palmer v. State, 438 So.2d 1 (Fla. 1983), the defendant burst into a funeral parlor during a wake brandishing a gun and simultaneously robbed thirteen people. Upon the defendant's convictions for thirteen counts of armed robbery, the trial judge imposed thirteen consecutive seventy-five year sentences, directing that the three-year mandatory minimum sentences he was required to impose pursuant to §775.087(2),[2] Fla.Stat. due to the defendant's possession

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[2] The pertinent §775.087(2)(1979) read, in pertinent part, as follows:

> 775.087 Possession or use of a weapon; aggravated battery; felony reclassification; minimum sentence.--
> (2) Any person who is convicted of:
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy or any attempt to commit the aforementioned crimes....and who had in his

(Continued next page)

of a firearm during these felonies would also be served consecutively. This Court ultimately held that "the imposition of cumulative three-year mandatory minimums of each of thirteen consecutive sentences (for multiple offenses) arising from the same criminal episode" was improper under the unamended §775.021(4), Fla.Stat. Id.,[3] The Court qualified this holding, however, by adding that the decision did not "prohibit consecutive mandatory minimum sentences arising from separate incidents occurring at seperate times and places", id., 4, while citing to Vann v. State, 366 So.2d 1241 (Fla. 3rd DCA 1979)--a decision which unfortunately did not clarify the parameters of the aforedescribed exception.

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Footnote 2 Continued

> possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Nothwithstanding the provision of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.27 or s. 944.29, prior to serving such minimum sentence.

The subsequent amendment to this statute is of no relevance here.

3 The unamended §775.021(4) read:

> 775.021 Rules of construction.--
> (4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

(Continued next page)

In its subsequent decisions of State v. Ames, 467 So.2d 994 (Fla. 1985) and Wilson v. State, 467 So.2d 996 (Fla. 1985) this Court, again interpreting the unamended §775.021(4), significantly clarified the scope of the Palmer exception. In Ames, the Court held that a defendant who had possessed a gun while breaking into a woman's house, robbing her in one room and raping her in another, could not receive consecutive mandatory minimum sentences upon his adjudications for these three substantive offenses, while in Wilson, the Court held that a defendant who had possessed a gun while kidnapping a woman from her apartment porch and driving her a short distance away to rape her could not be similarly sentenced.

Thus we know that Palmer and its progeny prohibit the consecutive imposition of mandatory minimum sentences upon defendants who possess guns while simultaneously committing the same crime against multiple victims in the

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Footnote 3 Continued

Effective for crimes occurring on or after June 22, 1983, §775.021(4) reads:

775.021 Rule of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

same exact locale, and while proximately committing distinct crimes against the same victim in proximate locales. What we do not yet know is whether Palmer and its progeny prohibit the consecutive imposition of mandatory minimum sentences upon defendants who possess guns while proximately committing distinct crimes against distinct victims in proximate locales, which is the situation presented in this case. The State would submit that respondent's actions in using his weapon to attempt to murder Bertha Jones inside her abode, and then in aggravatedly assaulting Earl McFadden, a distinct victim, outside this abode, should have rendered him eligible for consecutive mandatory minimum sentences under Palmer and its progeny. See Castro v. State, ___So.2d___ (Fla. 3rd DCA 1985), 10 F.L.W. 1630, wherein the Third District reached precisely this conclusion in a very similar factual setting, affirming the imposition of consecutive mandatory minimum sentences upon a defendant who used his gun to rob a woman in her home, and then to attempt to murder a police officer who appeared at the woman's front door; compare Murray v. State, ___So.2d___(Fla. 4th DCA 1984), 9 F.L.W. 1466, on motion for rehearing granted in part (Fla. 4th DCA 1985), 10 F.L.W. 1581. The Legislature has declared its sympathy for crime victims, see §960.02, Fla.Stat., and this Court should honor that declaration by validating the trial judge's imposition of two consecutive mandatory minimum sentences based upon respondent's use of a gun to criminally invade the privacy of the two distinct victims in this case.

Although such would not be necessary to a resolution of the instant case, the State would close by urging this Court to clarify that the aforediscussed rule of Palmer v. State and its progeny does not apply to crimes committed on or after June 22, 1983-i.e., the effective date of the amended §775.021(4), Fla.Stat. This statute makes it clear that the "single transaction rule" upon which Palmer and its progeny are inferentially based, and which this Court has correctly repudiated in other contexts, see e.g. Borges v. State, 415 So.2d 1265 (Fla. 1982) and Rotenberry v. State, 468 So.2d 971 (Fla. 1985), is under all circumstances a dead letter in Florida. See Maddox v. State, 461 So.2d 176 (Fla. 1st DCA 1984) and McGouirk v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1514; compare Suarez v. State, 464 So.2d 259 (Fla. 2nd DCA 1985), review granted (Fla. 1985), Case No. 66,789. Express limitation of the rule of Palmer v. State and its progeny will encourage the orderly administration of justice in Florida, and may also prevent a recurrence of unfortunate decisions such as Enmund v. State, 459 So.2d 1160 (Fla. 2nd DCA 1984), review granted (Fla. 1985), Case No. 66,264, wherein the Second District inappropriately relied upon Palmer to hold that that defendant could not receive consecutive life sentences without the possibility of parole for 25 years for two murders committed during the course of the same criminal episode, blithely ignoring this Court's earlier direction on remand that "[t]he sentencing court shall have the discretion to decide whether the two sentences

of life imprisonment are to be served concurrently or consecutively." Enmund v. State, 439 So.2d 1383 (Fla. 1985). The State recognizes that the overcrowding of Florida's prisons is an ongoing problem, see §944.096, Fla.Stat. and Lowry v. Florida Parole and Probation Commission and Wainwright, ___So.2d___(Fla. 1985), 10 F.L.W. 314, overruling Segal v. Wainwright, 304 So.2d 446 (Fla. 1974) *sub silentio*, but would urge that this problem must be dealt with legislatively rather than through creative judicial interpretation of plainly-worded mandatory minimum sentencing statutes.

## ISSUE II

THE FIRST DISTRICT SHOULD HAVE UPHELD THE TRIAL JUDGE'S DENIAL OF RESPONDENT'S COLLATERAL CLAIM THAT HE SHOULD NOT HAVE BEEN ORDERED TO SERVE HIS MANDATORY MINIMUM SENTENCES CONSECUTIVELY BECAUSE THE SENTENCES CHALLENGED WERE NOT IN EXCESS OF THE MAXIMUMS AUTHORIZED BY STATUTE AND THIS CLAIM SHOULD HAVE BEEN RAISED AT TRIAL AND UPON DIRECT APPEAL, REGARDLESS OF WHETHER THE STATE TIMELY ASSERTED THESE MATTERS AS BASES FOR DENYING RESPONDENT COLLATERAL RELIEF.

## ARGUMENT

This Court is obliged to answer the aforediscussed certified question vesting it with jurisdiction over this cause. See State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). However, regardless of how this Court answers this question,[4] its decision on this point will have the status of an advisory opinion, see State v. Kinner, 398 So.2d 1360 (Fla. 1981), insofar as the decision of the First District must be reversed and the consecutive sentencing conditions imposed reinstated.

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[4] The State notes that this Court recently answered a certified question adversely to a petitioner and then proceeded to afford him relief upon alternative grounds. Williams v. State, ___So.2d___(Fla. 1985), 10 F.L.W. 351.

If a trial judge has imposed sentences in excess of the maximums authorized by statute, whether or not the defendant has objected thereto, the defendant has a remedy either by direct appeal, see §924.06(1)(d), Fla.Stat. and Fla.R.App.P. 9.140(b)(1)(D), Williams v. State, 280 So.2d 518 (Fla. 3rd DCA 1973) and Cleveland v. State, 287 So.2d 347 (Fla. 3rd DCA 1973), see generally State v. Rhoden, 448 So.2d 1013 (Fla. 1984), or preferably, in order to give the trial judge the opportunity to rectify his own error, by a Fla.R.Crim.P. 3.850 motion to correct illegal sentence, which the defendant may appeal in the event of its denial, see Kelly v. State, 359 So.2d 493 (Fla. 1st DCA 1978); Green v. State, 450 So.2d 1275 (Fla. 5th DCA 1984). But as this Court has confirmed many times, issues which could have been raised at trial and/or upon direct appeal cannot otherwise serve as bases for collateral attack via Fla.R.Crim.P. 3.850 or, presumably, via Fla.R.Crim.P. 3.800. See, e.g., Spinkellink v. State, 350 So.2d 85 (Fla. 1977), cert. denied, 434 U.S. 960 (1977); Adams v. State, 380 So.2d 423 (Fla. 1980); Meeks v. State, 382 So.2d 673 (Fla. 1980), cert. denied, 459 U.S. 1155 (1983); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980); Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Demps v. State, 416 So.2d 808 (Fla. 1982); Armstrong v. State, 429 So.2d 287 (Fla. 1983), cert. denied, ___U.S.___, 78 L.Ed.2d 177 (1983); and State v. Washington, 453 So.2d 389 (Fla. 1985); see also Walker v. State, 462 So.2d 452 (Fla. 1985), State v. Snow, 462 So.2d 455 (Fla. 1985), Pedroso v. State, 420 So.2d 908 (Fla. 2nd DCA 1982), and Keitz v.

State, 466 So.2d 1147 (Fla. 4th DCA 1985). Certain strong language in several of the aforecited decisions suggests that this rule is self-executing or, in other words, jurisdictional, and hence must be observed by the appellate courts even where not explicitly relied upon by the State. See, e.g., Meeks v. State, 382 So.2d 673,675, holding that issues which "could have been raised on direct appeal... are foreclosed...for collateral review"; Hargrave v. State, 396 So.2d 1127,1128, holding that such issues are "not cognizable" on collateral attack; and Demps v. State, 416 So.2d 808,809, holding that such issues "may be dismissed." Compare Sunmer v. Mata, 449 U.S. 539,547, footnote 2 (1981), in which the United States Supreme Court held that a prison superintendent in a federal habeas corpus action cannot waive judicial consideration of jurisdictional deficiencies in a prisoner's petition for the writ merely by failing to raise them. Cf Banks v. State, 342 So.2d 469 (Fla. 1976), Brown v. State, 13 So.2d 458 (Fla. 1943), and Weatherington v. State, 262 So.2d 724 (Fla. 3rd DCA 1972), cert. denied, 267 So.2d 330 (Fla. 1972), cert. denied, 411 U.S. 968 (1973), affirming the pre-guideline tradition that the alleged severity of a sentence within statutory parameters was not appealable; cf also Kelly v. State, Parker v. State, 214 So.2d 632 (Fla. 2nd DCA 1978), Bertone v. State, 388 So.2d 347 (Fla. 1st DCA 1980), and Butler v. State, 343 So.2d 93 (Fla. 3rd DCA 1977), collectively standing for the proposition that unless a sentence is illegal as in excess of statutory maximum,

a trial court's denial of a criminal defendant's Fla.R.Crim.P. 3.800(b) motion to correct sentence is not appealable.

Even if the aforementioned rule is not jurisdictional, a Florida appellate court is still required to affirm the ruling of a trial judge where he was right for any reason, whether articulated or otherwise:

> It should be kept in mind that the judgment of the trial court reached the district court clothed with a presumption in favor of its validity. 1 Fla.Law and Practice, Appeals § 152,2 Fla.Jur., Appeals, § 314, and authorities cited therein. Accordingly, if upon the pleadings and evidence before the trial court, there was *any* theory or principle of law which would support the trial court's judgment...., the district court was obliged to affirm the judgment.

Cohen v. Mohawk, 137 So.2d 222,225 (Fla. 1962).[5] See also Smith v. Phillips, 455 U.S. 209 (1982); City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954); Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963).[6] Compare Gayle v. Fevre, 613 F.2d 21 (2nd Cir. 1980),

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5 First emphasis in original

6 The State would note parenthetically that the First District occasionally turns this principle upon its head, reversing trial court rulings on the basis of errors which the defense has not even obliquely raised on appeal, see e.g. Soloman v. State, 442 So.2d 1030 (Fla. 1st DCA 1983) and Reichman v. State, ___ So.2d ___ (Fla. 1st DCA 1985), 10 F.L.W. 1481. The State would further note that the First District recently decided the merits of a Palmer claim raised collaterally without even having ordered the State to respond and thus have the opportunity to raise a default argument, Maddox v. State. Given these realities, the State's initial failure to fully press its default claim with the First District, if not wholly excusable, becomes at least understandable.

holding that a federal appellate court may predicate its affirmance of a district court's denial of a habeas corpus petition on the movant's nonjurisdictional failure to exhaust his available state remedies, although such was not urged as a basis for denying the writ by the respondent.

Because respondent's sentences for attempted first degree murder and aggravated assault were not in excess of the maximums authorized by statute, see §§782.04(1)(a), 777.04(1) and (4)(a), 784.021(1)(a), and 775.082(3)(b) and (d), Fla.Stat., and because his claim that he should not have been ordered to serve his mandatory minimum conditions thereof consecutively was indisputably cognizable at trial and upon direct appeal, see e.g., Palmer v. State, Wilson v. State, State v. Ames and Pettis v. State, 448 So.2d 565 (Fla. 4th DCA 1984), his failure to so present this claim constituted an irredeemable procedural default upon which the First District should have relied to reject respondent's collateral appeal, regardless of how clearly argued by the State. The trial judge in this case articulated a proper basis for denying respondent relief based upon this Court's precedents, and the First District should have backed him up rather than shooting him down. Compare Stacey v. State, 461 So.2d 1000 (Fla. 1st DCA 1984), review granted (Fla. 1985), Case No. 66,447.

## CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that the decision of the First District must be REVERSED and this cause REMANDED with directions that the sentencing conditions originally imposed be REINSTATED.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Petitioner on the Merits has been forwarded to Ms. Glenna Joyce Reeves, Assistant Public Defender, P.O. Box, 671, Tallahassee, FL 32301, on this 6th day of August, 1985.

John W. Tiedemann
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